STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

Supreme Court
No. 154566

vs.

Court of Appeals
No. 327208

DEVAUN LAROY LOPEZ,
Defendant-Appellee.
_____/

Circuit Court
No. 14-040317-FC

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF TO ITS APPLICATION FOR LEAVE TO APPEAL PURSUANT TO MCR 7.305(H)(1)

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I. **Is MRE 804(a)'s designation of a witness as "unavailable" predicated on the requirement that the unavailability of the witness not be "due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying[?]" While not defined by the rule, is the phrase "for the purpose of," commonly understood as being synonymous with intent? If so, does MRE 804(a) create a threshold question for admissibility of a statement under MRE 804(b)? Therefore, is the question to be asked not whether the act causing unavailability was itself intentional, but rather whether the act causing unavailability was done with the specific intent of preventing the witness from attending or testifying?**

II. **Because a witness is not unavailable for the purposes of MRE 804(a) if the unavailability is due to procurement or wrongdoing of the proponent of the statement done with the specific intent to prevent the witness from attending or testifying, and the proponent of the statement must make a threshold showing that it acted with no such intent, is MRE 804(a)'s exclusion of testimony because of the procurement or wrongdoing by a statement's proponent analogous to MRE 804(b)(6)'s inclusion of testimony do to the procurement or wrongdoing of the statement's opponent because both rules prohibit the same activity? Therefore, it is reasonable to apply a modified version of the forfeiture-by-wrongdoing doctrine's test for admissibility when determining, by a preponderance of the evidence, whether the proponent intentionally caused the declarant to be unavailable: (1) that the proponent of the statement procured or engaged in wrongdoing; (2) that, based on the totality of the circumstances, the procurement or wrongdoing was intended to prevent the witness from attending or testifying; and (3) that the procurement or wrongdoing did cause the witness's failure to testify?**

KEY TO ABBREVIATIONS

The following abbreviation is used in this brief:

1. "TT4" refers to Volume IV of the trial transcripts dated March 15, 2015.

STATEMENT OF FACTS

On August 18, 216, the Michigan Court of Appeals issued *People v Devaun Laroy Lopez*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 327208), vacating the conviction of the defendant-appellant. Specifically, the *Lopez* panel held that the prosecutor threatened and intimidated witness Dennis Hoskins, thereby inducing him to invoke his Fifth Amendment right against self-incrimination and procuring his unavailability. The Court of Appeals did not find that the prosecutor acted negligently. The *Lopez* panel did find that because the prosecution's actions rendered the witness unavailable, the transcript of his preliminary exam testimony was not admissible pursuant to MRE 804(a).

On or about October 13, 2016, the People filed their Application to this Honorable Court for leave to Appeal the Michigan Court of Appeals decision in *People v Devaun Laroy Lopez*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 327208). On or February 1, 2017, this Court ordered the parties to file supplemental briefs pursuant to MCR 7.305(H)(1). In that order, this Court instructed the parties to address:

> (1) whether prior testimony is admissible under MRE 804(b)(1) where the proponent of the statement has caused the declarant to be unavailable under MRE 804(a), regardless of any intent by the proponent to cause unavailability; and, (2) if some form of intent is required, what standards should apply when determining whether the proponent's actions were intended to cause the declarant to be unavailable. [*People v Lopez*, 889 NW2d 501, 502 (Mich 2017).]

This supplemental brief follows.

ARGUMENT I

MRE 804(a)'s designation of a witness as "unavailable" is predicated on the requirement that the unavailability of the witness not be "due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying." While not defined by the rule, the phrase "for the purpose of," is commonly understood as being synonymous with intent. In that way, MRE 804(a) creates a threshold question for admissibility of a prior recorded statement under MRE 804(b). Therefore, the question to be asked is not whether the act causing unavailability was itself intentional, but rather whether the act causing unavailability was done with the specific intent of preventing the witness from attending or testifying.

A. STANDARD OF REVIEW

"A trial court's discretionary decisions concerning whether to admit or exclude evidence 'will not be disturbed absent an abuse of that discretion.'" *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010), quoting *People v McDaniel,* 469 Mich 409, 412; 670 NW2d 659 (2003). "A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes." *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012), citing *People v Babcock,* 469 Mich 247, 269; 666 NW2d 231 (2003). "When the decision involves a preliminary question of law however, such as whether a rule of evidence precludes admission, we review the question de novo." *Mardlin*, 487 Mich at 614, citing *McDaniel,* 469 Mich at 412. Whether a defendant was denied his constitutional right to confrontation is reviewed *de novo*. *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009).

"When construing court rules, including evidentiary rules, this Court applies the same principles applicable to the construction of statutes." *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013), citing *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998). "Accordingly, we begin with the rule's plain language." *Duncan*, 494 Mich at 723, citing *Danse Corp v City of Madison Heights*, 466 Mich 175, 181–182; 644 NW2d 721 (2002). "When

the language of the rule is unambiguous, we enforce the plain meaning without further judicial construction." *Duncan*, 494 Mich at 723, citing *Danse Corp*, 466 Mich at 18. "Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. *Whitman v City of Burton*, 493 Mich 303, 311-12; 831 NW2d 223 (2013), citing Baker v Gen. Motors Corp, 409 Mich 639, 665; 297 NW2d 387 (1980). "The Court may refer to dictionaries to aid in discerning the plain meaning of a rule." *Duncan*, 494 Mich at 723, citing *Fremont Ins Co v Izenbaard*, 493 Mich 859, 859; 820 NW2d 902 (2012).

B. LEGAL STANDARDS

"Hearsay is 'a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *Duncan*, 494 Mich at 724, quoting MRE 801(c). "'Hearsay is generally prohibited and may only be admitted at trial if provided for in an exception to the hearsay rule.'" *Duncan*, 494 Mich at 724, quoting *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). "MRE 804(b) enumerates several exceptions to the rule prohibiting hearsay evidence that apply when a declarant is deemed unavailable as a witness pursuant to MRE 804(a)." *Duncan*, 494 Mich at 724. "Consequently, if a witness is determined to be unavailable, certain evidence that would otherwise be inadmissible may be admitted at trial so long as it meets the requirements of MRE 804(b) and is not otherwise excluded by another rule of evidence." *Duncan*, 494 Mich at 724, citing MRE 402, MRE 403, MRE 404.

MRE 804 provides, in relevant part, that:

> (a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant--

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
> (3) has a lack of memory of the subject matter of the declarant's statement; or
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.
>
> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement *for the purpose of* preventing the witness from attending or testifying.
>
> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. [MRE 804 (a) & (b)(1)(emphasis added).]

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .." US Const, Am VI; see also Const 1963, art 1, § 20. The Confrontation Clause normally bars the admission of a witness's testimonial statements if the witness does not appear at trial unless the defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed2d 177 (2004). Likewise, this Court has recognized that a trial court may admit former testimony "at trial under both MRE 804(b)(1) and the Confrontation Clause as long as the witness is unavailable for trial and was subject to cross-examination during the prior testimony." *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009), citing *Crawford*, 541 US 36. A witness is considered

"unavailable" when he asserts his Fifth Amendment right to silence at trial. *People v Meredith*, 459 Mich 62, 65-66; 586 NW2d 538 (1998).

C. DISCUSSION

As with any interpretive investigation of a statute, court rule, or rule of evidence, the analysis must begin with the examination of the text of MRE 804 itself. On its face, MRE 804(a) provides, in relevant part, that:

> [a] declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement *for the purpose of* preventing the witness from attending or testifying. [MRE 804(a).]

As used above, "for the purpose of" is a prepositional phrase. See *The American Heritage Dictionary* (3rd ed) ("A phrase that consists of a preposition and its object and has adjectival or adverbial value . . .." *Id.* at 1080). *Merriam-Webster's Collegiate Dictionary* defines a phrase as, "a word or group of words forming a syntactic constituent with a single grammatical function." *Merriam-Webster's Collegiate Dictionary* (11th ed), p 934. *The American Heritage Dictionary* defines a phrase, in part, as "[t]wo or more words in sequence forming a syntactic unit that is less than a complete sentence." *The American Heritage Dictionary* (3rd ed), p 1030.

The Court will note that the Rules of Evidence do not define the prepositional phrase, "for the purpose of." When a rule of evidence does not define a term, "[t]he Court may refer to dictionaries to aid in discerning the plain meaning of a rule." *Duncan*, 494 Mich at 723. Accordingly, *Merriam-Webster's Collegiate Dictionary* defines "purpose" as: "1a: something set up as an object or end to be attained: INTENTION b: RESOLUTION, DETERMINATION 2: a subject under discussion or an action in course of execution *syn* see INTENTION – on purpose: by intent: INTENTIONALLY[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed), p

1011(emphasis in original). Similarly, *The American Heritage Dictionary* defines "purpose" as: "1. The object toward which one strives or for which something exists; an aim or goal. 2. A result or an effect that is intended or desired; an intention. . . . *idioms*. on purpose. Intentionally; deliberately." *The American Heritage Dictionary* (3rd ed), p 1111. Finally, *Black's Law Dictionary* defines "purpose" as: "[t]hat which one sets before him to accomplish or attain; an end, intention, or aim, object, plan, project. Term is synonymous with ends sought, an object to be attained, an intention, etc." *Black's Law Dictionary* (6th ed), p 1236.

In *People v McIntosh*, 142 Mich App 314; 370 NW2d 337, 343, aff'd in part, app den in part 422 Mich 951; 376 NW2d 653 (1985), the Michigan Court of Appeals was asked to decide If, "a prosecutor, as the proponent of prior recorded testimony, [may] induce the declarant to invoke her privilege against self-incrimination and still satisfy the "unavailability" requirements of both the Confrontation Clause and MRE 804," *Id.* at 324, where the witness testified at the preliminary examination and was later charged with a crime. Ultimately, the *McIntosh* Panel concluded that, "the burden is on the prosecution to establish that the witness whose prior recorded testimony is being offered is, in fact, 'unavailable' and that the prosecution has not, either intentionally or negligently, contributed to making the witness unavailable." *Id.* at 327.

In reaching that conclusion, the Michigan Court of Appeals stated that, "a witness may properly be found to be unavailable after pleading the Fifth Amendment and that a prosecutor may then properly use the witness's preliminary examination testimony as substantive evidence in a trial." *Id.* at 324, citing *People v Oaks,* 94 Mich App 745; 290 NW2d 70 (1980). The *McIntosh* panel went on to confirm that, "[h]owever, even under MRE 804(a), '[a] declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement *for the*

purpose of preventing the witness from attending or testifying'". *McIntosh*, 142 Mich App at 324, quoting MRE 804(a) (emphasis added). The court reasoned that, under MRE 804(a), if the prosecution brought about the witness's failure to testify with the intent of preventing her testimony, the witness was not unavailable *for the purpose of* admitting the statement under MRE 804(b). See *McIntosh*, 142 Mich App at 324.

Before making its ultimate conclusion, however, the *McIntosh* panel departed from the plain language of MRE 804(a) and went on to cite *Motes v United States*, 178 US 458, 20 S Ct 993, 44 L Ed 1150 (1900), in support of the proposition that a witness's absence due to negligent, unintentional acts of the government did not constitute "unavailability" as contemplated by the confrontation clause. See *McIntosh*, 142 Mich App at 325. The Court of Appeals highlighted the fact that the *Motes* Court's, "ruling was not premised in any way upon a finding that the prosecution had intended that the witness not appear in court." *Id.* Ultimately, *McIntosh* remanded the matter to the trial court for an evidentiary hearing to determine why the witness refused to testify at trial. *Id.* at 328. Along with that remand were instructions for the trial court, "to place the burden on the prosecution to show that it was not intentionally or negligently responsible for Alexander's refusal to testify." *Id.*

The *Lopez* panel relied heavily on *McIntosh* and MRE 804(a) when it held that the prosecutor's actions compelled the witness to plead the Fifth Amendment, thereby procuring his unavailability and rendering his prior recorded testimony inadmissible. Regarding MRE 804(a), *Lopez* states that, "MRE 804(a)(5) provides that a witness is not 'unavailable' if the party's absence 'is due to the procurement or wrongdoing of the proponent' of the testimony." *Lopez*, ___ Mich App at __. Notable is the Court of Appeals' focus on MRE 804(a)'s requirement for an affirmative act, i.e. "procurement or wrongdoing," ignores the portion of MRE 804(a) that

specifically requires the intent that the affirmative act be "for the purpose of preventing the witness from attending or testifying." MRE 804(a). Additionally, the Lopez panel never finds that the prosecutor acted intentionally or negligently.

Further overlooked by the *Lopez* panel, is *McIntosh*'s suggestion that if a witness, who pled the Fifth Amendment after the prosecution charged him with a crime and whose prior recorded testimony was being offered, would have refused to testify even if he had not been charged, the witness would be unavailable and the prosecutor would be entitled to use his prior recorded testimony. See *McIntosh*, 142 Mich App at 327, n 8. In the case before the bench, the record is clear that the prosecutor had information that the witness was going to take the stand with the intent to undermine the People's case against the defendant-appellant. The witness's intent could have been to provide testimony inconsistent with that from his preliminary exam, or his intent could have been to plead the Fifth Amendment and not testify at all. Both options are possible outcomes, even if the prosecutor had refrained from taking any anticipatory action. In fact, the record supports this conclusion as the attorney representing the witness testified that the witness's family had received threats on Facebook. TT4, pp. 13-14. Therefore, it is reasonable to assume that the witness would have refused to testify even if he had not been warned of the penalties for perjury. *McIntosh* considers the witness unavailable in this situation, entitling the prosecutor to use his prior recorded testimony.

As the Court is surely aware, there is a dearth of case law interpreting the meaning of MRE 804(a)'s use of the phase, "for the purpose of." While there are many cases that cite that portion of MRE 804(a), most are unpublished Michigan Court of Appeals opinions and most of those cases draw their conclusions in conjunction with *McIntosh*. For example, in *People v Abraham*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2005,

(Docket No. 248457), the Court of Appeals stated that, "[i]f the prosecution causes a witness's failure to testify with either threats or actual prosecution, *with the intent of preventing the witness' testimony*, the witness will not be deemed "unavailable" under MRE 804(a)." *Abraham*, upub op at 7, quoting *People v. McIntosh*, 142 Mich App 314, 324; 370 NW2d 337 (1985) (emphasis added).

In *People v Adams*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001, (Docket No. 224911), the Court of Appeals stated that, "[i]f the prosecution brings about a witness's failure to testify with either threats or actual prosecution, *with the intent of preventing the witness's testimony*, then the witness will not be deemed "unavailable" pursuant to MRE 804(a)." *Adams*, unpub op at 1, citing *McIntosh,* 142 Mich App at 324 (emphasis added). The *Adams* decision also recognizes the *McIntosh* negligence prong, but it focuses its holding on whether the prosecutor intended to prevent the witness's testimony. See *People v Lee*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2004, (Docket No. 245455), p 6 ("[i]f the prosecution intentionally causes a witness's failure to testify with either threats or actual prosecution, the witness will not be deemed 'unavailable' under MRE 804(a)"), citing *McIntosh,* 142 Mich App at 324. See also *People v Laws*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2004, (Docket No. 245454), p 4.

D. CONCLUSION

Based on a plain reading of MRE 804(a), and the relevant case law, MRE 804(a)'s designation of a witness as "unavailable" is predicated on the requirement that the unavailability of the witness not be "due to the procurement or wrongdoing of the proponent of the statement

for the purpose of preventing the witness from attending or testifying." MRE 804(a). Based on the above discussion, "for the purpose of" is synonymous with intent. MRE 804(a) and supporting case law, create a threshold question for admissibility of a prior recorded statement under MRE 804(b). As noted above, the question to be asked is not whether the act causing unavailability was itself intentional, but rather whether the act causing unavailability was done with the specific intent of preventing the witness from attending or testifying. Therefore, the prior recorded testimony of a witness is admissible under MRE 804(b)(1) where the proponent of the statement may have caused the declarant to be unavailable under MRE 804(a), but did not do so with the intent of preventing the witness's testimony.

ARGUMENT II

Because a witness is not unavailable for the purposes of MRE 804(a) if the unavailability is due to procurement or wrongdoing of the proponent of the statement done with the specific intent to prevent the witness from attending or testifying, the proponent of the statement must make a threshold showing that it acted with no such intent. In this way, MRE 804(a)'s exclusion of testimony because of the procurement or wrongdoing by a statement's proponent can be considered inversely analogous to MRE 804(b)(6)'s inclusion of testimony do to the procurement or wrongdoing of the statement's opponent because both rules prohibit the same activity. Therefore, it is reasonable to apply a modified version of the forfeiture-by-wrongdoing doctrine's test for admissibility when determining, by a preponderance of the evidence, whether the proponent intentionally caused the declarant to be unavailable: (1) that the proponent of the statement procured or engaged in wrongdoing; (2) that, based on the totality of the circumstances, the procurement or wrongdoing was intended to prevent the witness from attending or testifying; and (3) that the procurement or wrongdoing did cause the witness's failure to testify.

A. STANDARD OF REVIEW

"A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738, 742 (2013), citing *McDaniel*, 469 Mich at 412. "Preliminary questions of law, including whether a rule of evidence precludes the admission of evidence, are reviewed de novo." *Id.* "Likewise, interpretation of a court rule is a question of law that we review de novo." *Burns*, 494 Mich at 110, citing *Marketos v Am Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001). "A preserved error in the admission of evidence does not warrant reversal unless 'after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.'" *Burns*, 494 Mich at 110, quoting *People v Lukity*, 460 Mich 484, 495–496; 596 NW2d 607 (1999) (internal quotation omitted).

B. LEGAL STANDARDS

"As with any preliminary factual question of admissibility under MRE 104(a), the condition is met if it is more likely than not that the fact occurred." *Merrow v Bofferding*, 458 Mich 617, 637–38; 581 NW2d 696 (1998). "Disputed preliminary questions of fact are resolved by a preponderance-of-the-evidence standard." *Id.*, citing *Bourjaily v United States*, 483 US 171, 175; 107 S Ct 2775; 97 L Ed2d 144 (1987). "Intent is a question of fact to be inferred from the circumstances by the trier of fact." *People v Kieronski*, 214 Mich App 222, 232; 542 NW2d 339 (1995). The trial court acts as the fact finder in determining questions of fact preliminary to the admissibility of evidence. See MRE 104(a). "In making the determination, the trial judge may consider all available evidence, including otherwise inadmissible evidence." *Merrow*, 458 Mich at 687.

"MRE 804(b) enumerates several exceptions to the rule prohibiting hearsay evidence that apply when a declarant is deemed unavailable as a witness pursuant to MRE 804(a)." *Duncan*, 494 Mich at 724. "Consequently, if a witness is determined to be unavailable, certain evidence that would otherwise be inadmissible may be admitted at trial so long as it meets the requirements of MRE 804(b) and is not otherwise excluded by another rule of evidence." *Duncan*, 494 Mich at 724, citing MRE 402, MRE 403, MRE 404.

MRE 804 provides, in relevant part, that:

> [a] declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement *for the purpose of* preventing the witness from attending or testifying. [MRE 804(a).]

Therefore, the proponent of a statement can forfeit the use of hearsay exceptions provided by MRE 804(b) if the he intentionally prevents a witness from attending or testifying due to his own procurement or wrongdoing.

Similarly, "[a] defendant can forfeit his right to exclude hearsay by his own wrongdoing." *Burns*, 494 Mich at 110, citing MRE 804(b)(6). Specifically, "MRE 804(b)(6) provides that a statement is not excluded by the general rule against hearsay if the declarant is unavailable, and the 'statement [is] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.'" *Id.* (bracket in *Burns*). This rule is commonly known as the forfeiture-by-wrongdoing rule, and was adopted in 2001. See *Burns*, 494 Mich at 110-11.

C. DISCUSSION

As discussed above, MRE 804(a)'s designation of a witness as "unavailable" is predicated on the requirement that the unavailability of the witness not be "due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying." MRE 804(a). "[F]or the purpose of" is synonymous with intent, and creates a threshold question for admissibility of a prior recorded statement under MRE 804(b). Therefore, the question a trial court must ask is not whether the act causing unavailability was itself intentional, but rather whether the act causing unavailability was done with the specific intent of preventing the witness from attending or testifying. The next issue to resolve in this analysis is determining the test that courts should apply, and factors that they should consider, when determining whether the proponent acted with specific intent.

Like MRE 804(a)'s preclusion of classifying a witness as "unavailable" for the purposed of admission of a statement under MRE 804(b) due to procurement or wrongdoing of the statement's proponent, the forfeiture-by-wrongdoing doctrine, MRE 804(b)(6), allows the admission of, "[a] statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." In *People v Jones*, 270 Mich App 208, 210–11; 714 NW2d 362, 365 (2006), the Court of appeals addressed this rule of inclusion, holding that admit hearsay under the forfeiture-by-wrongdoing doctrine, the prosecution was required to prove: "'(1) that the defendant engaged [in or encouraged] wrongdoing; (2) that the wrongdoing was intended to procure the declarant's unavailability; and (3) that the wrongdoing did procure the unavailability.'" *Jones*, 270 Mich App at 217, quoting *United States v Scott*, 284 F3d 758, 762 (CA 7, 2002). The Jones Court also held that the preponderance of the evidence standard was generally applicable to preliminary questions of admissibility, and was consistent with a majority of the federal circuit courts. *Jones*, 270 Mich App at 216.

In determining that the defendant had procured the unavailability of the witness, the *Jones* considered the totality of the defendant's actions, and found that he acted with specific intent when he "engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." MRE 804(b)(6), *Jones*, 270 Mich App at 216. Applying the preponderance of the evidence standard, the *Jones* panel cited *People v Vega*, 413 Mich 773, 778-780; 321 NW2d 675 (1982) for the proposition that, "MRE 104, which is identical to FRE 104, provides that the trial judge is to determine the conditions for the admissibility of evidence, including preliminary questions of admissibility." *Jones*, 270 Mich

App at 216. *Jones* went on to find, "no basis for deviating from the preponderance of the evidence standard generally applicable to preliminary questions of admissibility." *Id.*

In *People v Burns*, 494 Mich 104; 832 NW2d 738, 742 (2013), a jury convicted the defendant of first-degree criminal sexual conduct, contrary to MCL 750.520b. *Burns*, 494 Mich at 109. The Michigan Court of Appeals reversed the conviction, holding that the circuit court misapplied the forfeiture-by-wrongdoing analysis. *Id.* The Court of Appeals determined that the prosecutor had failed to establish that defendant had both the specific intent to cause the witness's unavailability, and that the wrongdoing did, in fact, cause the witness's unavailability by a preponderance of the evidence. *Id.* This Court affirmed the Court of Appeals and remanded for a new trial, holding that, "the prosecutor failed to establish by a preponderance of the evidence that defendant's conduct both was intended to, and did, cause [the witness's] unavailability." *Id.* at 120.

In so holding, this Court reasoned that, "[w]ithout the guidance of an explicit trial court finding to shed light on the record, defendant's contemporaneous statements to [the witness] are as consistent with the inference that defendant's intention was that the alleged abuse go undiscovered as they are with an inference that defendant specifically intended to prevent [the witness] from testifying." *Id.* at 116-117. "Further, assuming defendant knew that [the witness] would not disclose the abuse because of his directive, that knowledge is not necessarily the equivalent of the specific intent to cause [the witness's] unavailability to testify as required by MRE 804(b)(6)." *Burns*, 494 Mich at 117.

Regarding the interplay between the defendant's knowledge of the potential effect of his action and his specific intent to cause unavailability, this Court stated that:

> [a]ttempting to equate the two in every circumstance improperly assumes that a defendant's knowledge is always the same as a defendant's purpose. In other words, *whether a person in defendant's position would reasonably foresee that the wrongdoing might cause [the witness's] unavailability is separate and distinct from whether defendant intended to procure the declarant's unavailability to testify at trial*. [*Burns*, 494 Mich at 117 (emphasis added).]

By distinguishing between the reasonable foreseeability that a similarly situated party might cause the witness's unavailability and that party's intent to procure the witness's unavailability at trial, the *Burns* Court eliminated any negligence component from the analysis.

Invoking the objective standard for the determination of specific intent, and rejecting consideration of the subjective feelings of the witness, the *Burns* Court went on to state that:

> [w]e interpret the specific intent requirement of MRE 804(b)(6)-to procure the unavailability of the declarant as a witness-as requiring the prosecution to show that defendant acted with, at least in part, the particular purpose to cause [the witness's] unavailability, rather than mere knowledge that the wrongdoing may cause the witness's unavailability." [*Burns*, 494 Mich at 117.]

Finally, the *Burns* Court reasoned that, "[w]ithout the aid of a specific factual finding from the trial court in this case, we are unable to determine from the record whether defendant had the requisite specific intent." *Id.*

It is also important to note that unlike the case at bar, the *Burns* Court and the Court of Appeals excluded the statement at issue due to the prosecutor's failure to satisfy the specific elemental standards for admissibility under MRE 804(b)(6). It did so by considering the defendant's specific intent based on an analysis of the totality of the circumstances, and applying that analysis to the elemental standards enumerated by the *Jones* panel. See *Burns*, 494 Mich at 115.

The portion of MRE 804(a) at issue here is exclusionary by nature. MRE 804(a) provides in part that, "[a] declarant is not unavailable as a witness if exemption, refusal, claim of lack of

memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying." MRE 804(a). However, MRE 804(b)(6) is inclusive by nature. Accordingly, MRE 804(b)(6) provides that, "[a] statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

On their face these rules offer opposite relief. In fact, the practical application and procedural manifestation of the rules seems inapposite. However, these rules are not mutually exclusive: either party may invoke the inclusive nature of MRE 804(b)(6) or the exclusive nature of MRE 804(a). Further, they share substantially similar elements. Specifically, they both require procurement or wrongdoing, that the wrongdoing was intended to procure the witness's unavailability, and that the procurement or wrongdoing did cause unavailability. Accordingly, the spirit of the rules are analogous in the sense that they punish the procurement or wrongdoing of a party that causes the unavailability of a witness with the intent to prevent the witness's testimony.

Based on the preceding discussion, a comparison of the rules in question, and consideration of relevant caselaw, it is reasonable to take the "unavailability" language of MRE 804(a) and craft a clear, unambiguous set of standards modeled after the standard currently used for determining admissibility of a statement under MRE 804(b)(6). Therefore, it is reasonable to apply a modified version of the forfeiture-by-wrongdoing doctrine's test for admissibility when determining, by a preponderance of the evidence, whether the proponent intentionally caused the declarant to be unavailable:

> (1) that the proponent of the statement procured or engaged in wrongdoing; (2) that, based on the totality of the circumstances, the procurement or wrongdoing

was intended to prevent the witness from attending or testifying; and (3) that the procurement or wrongdoing did cause the witness's failure to testify.

D. CONCLUSION

Pursuant to MRE 804(a), the proponent of a statement can forfeit use of the hearsay exceptions provided by MRE 804(b) if the he intentionally prevents a witness from attending or testifying due to his own procurement or wrongdoing. Similarly, "[a] defendant can forfeit his right to exclude hearsay by his own wrongdoing." *Burns*, 494 Mich at 110, citing MRE 804(b)(6). Specifically, "MRE 804(b)(6) provides that a statement is not excluded by the general rule against hearsay if the declarant is unavailable, and the 'statement [is] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.'" *Id.* (bracket in *Burns*).

As discussed above, MRE 804(a)'s designation of a witness as "unavailable" is predicated on the requirement that the unavailability of the witness not be "due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying." MRE 804(a). "[F]or the purpose of" is synonymous with intent, and creates a threshold question for admissibility of a prior recorded statement under MRE 804(b). In that way, MRE 804(a) and MRE 804(b)(6) are analogous in their purpose and respective requirements for application – to punish parties who intentionally prevent witnesses from testifying due to procurement or wrongdoing. Therefore, this Court need look only as far as the Michigan Rules of Evidence and its own prior decisions to resolve this issue.

SUMMARY AND RELIEF SOUGHT

WHEREFORE, the People respectfully request that this Honorable Court grant its application for leave to appeal the judgment of the Court of Appeals. Or, in the alternative: (1) reverse the Court of Appeals' decision in its entirety and reinstate Defendant's conviction and sentence; or (2) reverse the Court of Appeals' decision in its entirety and remand this matter to the trial court for an evidentiary hearing with instructions to use the following test to determine, by a preponderance of the evidence, whether the proponent intentionally caused the declarant to be unavailable:

> (1) that the proponent of the statement procured or engaged in wrongdoing; (2) that, based on the totality of the circumstances, the procurement or wrongdoing was intended to prevent the witness from attending or testifying; and (3) that the procurement or wrongdoing did cause the witness's failure to testify.

.

Respectfully submitted,

JOHN A. MCCOLGAN, JR. (P37168)
PROSECUTING ATTORNEY

Dated: March 15, 2017

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APPENDIX

A

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOE EDWARD ABRAHAM,

Defendant-Appellant.

UNPUBLISHED
March 15, 2005

No. 248457
Oakland Circuit Court
LC No. 1999-166150-FC

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant was convicted of conspiracy to deliver or possess with intent to deliver 650 or more grams of a controlled substance, MCL 750.157a and MCL 333.7401(2)(a)(*i*),[1] and sentenced to a prison term of thirty to sixty years. He appeals as of right. We affirm.

I. Underlying Facts

Defendant's conviction arises from allegations that he engaged in a long-term drug trafficking conspiracy with Roderick Lee and Nathaniel Lee, who allegedly led and equally controlled the purported Lee family organization, and others. Defendant allegedly was the primary supplier for the organization. Roderick and others, in turn, allegedly supplied numerous individuals, who sold to third parties.

Eric Lee, who is the nephew of Roderick and Nathaniel, began working for Roderick in 1989, and continued selling cocaine and heroin for his uncles until 1996. Eric testified[2] that Roderick and Nathaniel led the Lee organization and were equally in control. In 1989, Nathaniel lived with Eric's mother and kept more than a kilogram of cocaine in their apartment. Eric, then fourteen years old, began stealing portions of the cocaine to sell. After Eric's activities were discovered, Roderick began supplying Eric weekly with cocaine to sell. Eric initially began with half-ounce amounts, which eventually grew to over half a kilogram. Eric testified that, on one

[1] MCL 333.7401(2)(a)(*i*) was amended by 2002 PA 665 by increasing the statutory minimum from 650 grams to 1,000 grams.

[2] Eric was unavailable for trial, so the court admitted his preliminary examination testimony.

occasion, he observed over a kilogram of powder cocaine and over a kilogram of crack cocaine at Roderick's apartment. Roderick was in the process of converting the powder into crack cocaine.

Over the years, Eric observed large quantities of drugs being delivered to Roderick and Nathaniel. Eric observed defendant and Roderick together, and believed that the delivery individuals were "running" for defendant. In 1995, Eric heard defendant tell Roderick that he "had to pay." Later that day, Eric saw defendant at Roderick's house, and Roderick gave Eric some heroin to get tested. Eric testified that, in total, Roderick supplied him with more than 650 grams of cocaine for sale and distribution to third parties. Eric indicated that Roderick also supplied drugs to several other people, including Demar Garvin, Louis Laws, John Stanley, and LaMark Northern.

Northern testified that he first received cocaine from Roderick in 1987 or 1988, and also received cocaine from Garvin, who purchased his cocaine from defendant and Roderick. For years, beginning in approximately 1993, Northern routinely received cocaine and heroin from Roderick and Garvin, totaling more than 650 grams, which he broke down into smaller quantities and sold to third parties in the Pontiac area. In 1995, Northern and Garvin were at defendant's house when defendant offered to "front" them drugs to sell in exchange for sharing the profits, but Northern opted to purchase the drugs from defendant. Subsequently, Northern bought at least a half-kilogram of drugs directly from defendant between five and ten times. Northern typically pooled his money with Rashad Anthony and Marvin Smith to buy the drugs. At least twice, Northern and Garvin pooled their money to buy drugs from defendant and once bought a full kilogram. On one occasion, Northern, Roderick, and Garvin went to defendant's house and purchased between eight and ten kilograms of cocaine for $200,000. Northern stopped buying drugs from defendant because he owed defendant money.

Antonio James, a drug runner for Joseph Steins, testified that, from 1994 to 1997, he picked up cocaine from defendant in quantities of between one and three kilograms about twenty times over the course of a couple of years. In 1996, James saw a shipment of between twenty and twenty-five kilograms of cocaine delivered to defendant's house. James testified that, in 1996 or 1997, he heard defendant brag to Steins that his "Pontiac boys," Roderick and Nathaniel, were selling more drugs than the Steins organization.

In December 1996, the police observed defendant carry a gray box into a Romulus Fairfield Inn room, and leave empty-handed minutes later. Two days later, the police observed three men leave the room. The police stopped their van and confiscated a total of $57,800. A drug-sniffing canine alerted the police of drug residue on the money. In the motel room, the police found a gray box in the garbage, along with paper that matched paper that was used to bundle $46,000 of the confiscated money.

On December 11, 1997, someone from New York made three calls to defendant's Belleville residence. On the same day, someone at defendant's house called a Belleville Red Roof Inn. On the next day, someone at the Red Roof Inn twice called defendant's house. On that same day, the police observed two men enter the same Red Roof Inn room. Shortly thereafter, defendant and another man entered the room. Minutes later, the four men left the room, one carrying a brown paper bag, and ultimately went to defendant's house. Defendant and a woman subsequently left, rented a van, and returned to defendant's house. Another car arrived

and, at 1:20 a.m., the car and the van left the house. When the police stopped and searched the van, which carried defendant, several other men, and a woman, the police confiscated $1,642 from defendant, and $2,900 from another man. A drug-sniffing canine alerted the police of drug residue on the money. Inside the car, which was being driven by Steins, the police found $4,100 in the center console, which also indicated positive for drug residue.

In September 1998, search warrants were executed for ten homes purportedly connected to the Lee family organization, and numerous individuals allegedly involved in the conspiracy were arrested. Defendant was among those arrested. In a statement made to the police, defendant admitted that he received large quantities of cocaine from out of state, including New York, which he brokered to different drug organizations, including the Lee brothers and Steins. Defendant stated that he had received shipments a couple times a week for two or three years. The shipments were usually for two or three kilograms of cocaine, but he once received a shipment of thirty kilograms. Defendant indicated that he supplied "the Pontiac group" with drugs once or twice a week for two or three years, and that Roderick and Garvin came to his area to purchase drugs. Defendant admitted that, on one occasion, he sold twenty kilograms of cocaine to Roderick for $500,000. Abraham explained that their drug transactions added up to between fifteen and twenty multi-kilogram drug deals. Defendant stated that, in total, he had sold about two hundred kilograms of cocaine in his life.

Inside defendant's Belleville residence, the police found a loaded semi-automatic gun, a thirty-caliber gun, three cell phones, and an address book that contained phone numbers for Roderick and two New York individuals. The police confiscated phone records that showed several calls between defendant's residence and Roderick's residence. They also showed numerous calls between defendant's residence and two New York individuals whom defendant identified as his drug sources.

II. Double Jeopardy

Defendant first argues that the trial court abused its discretion by finding that manifest necessity existed to declare a mistrial at his first trial and, therefore, his second trial and subsequent conviction is prohibited by the Double Jeopardy Clauses of the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 15. We disagree.

On May 4, 2000, at approximately 5:00 p.m., the jury began deliberations in defendant's first trial. Approximately fifteen minutes later, the jurors were dismissed for the day. On May 5, at 9:00 a.m., the jurors resumed deliberations until they were dismissed for the day. On May 8, 2000, the jury resumed deliberations. At 11:53 a.m., the jury sent a note indicating that it was "deadlocked and cannot reach a unanimous decision." Without objection, the court read the "deadlocked jury" instruction, CJI2d 3.12, and ordered the jury to continue deliberating. The jury resumed deliberating at 1:47 p.m., and, at 2:19 p.m., sent out another note indicating:

> We have tried several ways to come to a unanimous decision since Friday morning and have remained deadlocked. Your charge to continue deliberations has resulted in the same deadlock. We feel that no further deliberations will result in a verdict.

After reading the note to counsel, the court indicated that, given the jury's two unequivocal expressions that it was deadlocked, the court had no choice other than to declare a mistrial. In response to defendant's objection, the court noted that, over the course of deliberations, the jury had the opportunity to revisit the testimony and examine the exhibits as it requested, and that, after the first indication of deadlock, it read the deadlocked jury instruction. The court found that, under those circumstances, it "would be a miscarriage of justice, when there's been such an open and clear case, to send these people back and say, you stay there until you come up with a verdict[.]" The court noted the danger of coercing a verdict, and the unfairness to the parties to "coerce 12 citizens to sit there until they satisfy [the court] and come up with a result when they told [the court] they can't."

The double jeopardy provisions of the United States and Michigan Constitutions protect citizens from multiple prosecutions for the same offense. *People v Lett*, 466 Mich 206, 213; 644 NW2d 743 (2002); *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). Because jeopardy attaches when a jury is selected and sworn, a defendant's interest in avoiding multiple prosecutions is protected even when there has been no prior determination of guilt or innocence. *Lett*, *supra* at 215. "However, the general rule permitting the prosecution only one opportunity to obtain a conviction must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.* (internal quotation omitted). If a trial is concluded prematurely, "a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of a manifest necessity." *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997), citing *People v Dawson,* 431 Mich 234, 251-253; 427 NW2d 886 (1988).

In *Lett*, *supra*, our Supreme Court stated the applicable standard of review as follows:

> A constitutional double jeopardy challenge presents a question of law that we review de novo. Necessarily intertwined with the constitutional issue in this case is the threshold issue whether the trial court properly declared a mistrial. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is accorded great deference by a reviewing court. "*At most,* . . . the inquiry . . . turns upon determination whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict." [*Lett*, *supra* at 212-213 (citations omitted; emphasis supplied).]

The Court noted that the trial judge's decision to declare a mistrial on the basis of juror deadlock is reviewed for an abuse of discretion, which "involves far more than a difference in judicial opinion." *Id.* at 220-221 n 12.

In discussing the "the concept of manifest necessity," the Court stated:

> The constitutional concept of manifest necessity does not require that a mistrial be "*necessary*" in the strictest sense of the word. Rather, what is required is a "high degree" of necessity. Furthermore, differing levels of appellate scrutiny are applied to the trial court's decision to declare a mistrial, depending on the nature of the circumstances leading to the mistrial declaration . . . . At the other end of the spectrum is the mistrial premised on jury deadlock, "long considered

> the classic basis for a proper mistrial." [*Id.* at 218-219 (citations omitted; emphasis supplied).]

The Court further explained:

> Consistent with the special respect accorded to the court's declaration of a mistrial on the basis of jury deadlock, this Court has never required an examination of alternatives before a trial judge declares a mistrial on the basis of jury deadlock; nor have we ever required that the judge conduct a "manifest necessity" hearing or make findings on the record. In fact, we long ago stated that, "[a]t most, . . . the inquiry in [such a case] turns upon determination *whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict.*" Moreover . . . . where the basis for a mistrial order is adequately disclosed by the record, the ruling will be upheld. [*Id.* at 221-222 (citations omitted; emphasis supplied in original).]

Here, the jury was discharged after deliberating for more than ten hours. Over the course of its deliberations, it was allowed to review certain testimony and exhibits that it requested. Despite this, it twice unambiguously communicated that it was unable to reach a verdict. After the first note, the court gave the deadlocked jury instruction, CJI2d 3.12, and sent the jurors back for further deliberations. Subsequently, after an additional half-hour of deliberations, the jurors sent a second note indicating that they "have remained deadlocked." The second note plainly expressed that the jury was not going to reach a verdict, and that further deliberations would be fruitless. Our Supreme Court in *Lett, supra* at 223 n 17, observed that it had "long ago indicated that 'the [trial] court is justified in accepting [the jury's] statement that [it] cannot agree as proper evidence in determining the question.'" (Citation omitted.) Contrary to defendant's assertion, "an examination of alternatives before a trial judge declares a mistrial on the basis of jury deadlock" is not required. *Id.* at 221. Moreover, as the trial court recognized, there was surely a risk that a jury forced to continue to deliberate after twice reporting that it was deadlocked may compromise too easily, which might well have worked to defendant's detriment rather than his benefit.

In sum, under these circumstances, the trial court did not abuse its discretion in finding that manifest necessity required a mistrial. Therefore, defendant's retrial, following the declaration of a mistrial, did not violate the double jeopardy protections against successive prosecutions. *Lett, supra* at 219 n 11.

III. Sufficiency of the Evidence

Next, defendant argues that the evidence was insufficient to sustain his conviction because there was no evidence that he was engaged in a conspiracy to possess with intent to deliver cocaine, but merely evidence of a buyer-seller relationship. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of

determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry,* 224 Mich App 447, 452; 569 NW2d 641 (1997).

To support a conviction for conspiracy to deliver a controlled substance, the prosecution must prove that

> (1) the defendant possessed the specific intent to deliver the statutory minimum as charged; (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged; and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. [*People v Mass*, 464 Mich 615, 629-630, 633; 628 NW2d 540 (2001), citing *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997).]

A conspiracy is an express or implied mutual agreement or understanding "between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means." *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991). To prove the intent to combine with others for an unlawful purpose, it must be shown that the intent, including knowledge, was possessed by more than one person. *People v Blume*, 443 Mich 476, 482; 505 NW2d 843 (1993). For intent to exist, the defendant must know about the conspiracy, know the conspiracy's objective, and intend to participate cooperatively to further the objective. *Id.* at 485. Direct proof of a conspiracy is not essential; rather, the coconspirators' intentions may be inferred from the circumstances and their acts and conduct. *Justice (After Remand)*, *supra* at 347. In other words, "[w]hat the conspirators actually did in furtherance of the conspiracy is evidence of what they agreed to do." *People v Hunter,* 466 Mich 1, 9; 643 NW2d 218 (2002).

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude that a conspiracy was proven beyond a reasonable doubt. The evidence, if believed, indicated that defendant knowingly cooperated with the Lee family organization to further a drug trafficking scheme to possess and deliver numerous kilograms of cocaine. In a statement to the police, defendant admitted receiving large quantities of cocaine from out of state, which he brokered to different drug organizations, including the Lee brothers. Defendant admitted that he received shipments of two or three kilograms of cocaine a couple times a week for two or three years. Defendant admitted that he supplied the Lee brothers with drugs once or twice a week for two or three years, totaling between fifteen and twenty multi-kilogram drug deals between them. Defendant also admitted that, on one occasion, he sold Roderick twenty kilograms of cocaine. A jury could reasonably infer that the amount of cocaine at issue was not for personal use, but intended for distribution to third parties.

In addition to defendant's own statements, phone records showed several calls between defendant's residence and Roderick's residence, and numerous calls between defendant's residence and two New York individuals whom defendant identified as his drug sources. Also, Northern testified that he regularly bought drugs from defendant and, on one occasion, accompanied Roderick and Garvin to defendant's house and purchased between eight and ten kilograms of cocaine. Additionally, James, a drug runner for Steins, testified that, from 1994 to

1997, he picked up cocaine from defendant in quantities of between one and three kilograms about twenty times over the course of a couple of years. In 1996, James saw a shipment of between twenty and twenty-five kilograms of cocaine delivered to defendant's house. James testified that, in 1996 or 1997, he heard defendant brag to Steins that his "Pontiac boys," Roderick and Nathaniel, were selling more drugs than the Steins organization.

Although defendant asserts that the evidence was insufficient to establish his participation in a conspiracy, the jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). As previously indicated, this Court will not interfere with the jury's determination of the weight of the evidence or the credibility of the witnesses. *Wolfe, supra* at 514-515. Moreover, a prosecutor need not negate every reasonable theory of innocence, but must only prove her own theory beyond a reasonable doubt in the face of the contradictory evidence provided by the defendant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction of conspiracy to deliver or possess with intent to deliver 650 or more grams of a controlled substance.

IV. Prosecutorial Misconduct

Defendant argues that the prosecution improperly revoked Eric Lee's immunity before trial, thereby forcing Eric to invoke his Fifth Amendment privilege, and enabling the prosecution to use his preliminary examination testimony at trial. We disagree.

Eric, who was involved in the drug trafficking conspiracy, testified before a grand jury in April 1998, and gave critical evidence against the Lee family organization. In December 1998, Eric testified at the preliminary examinations for defendant and other coconspirators. At Nathaniel's May 2000, preliminary examination, Eric claimed that he could not recall any details about the alleged drug trafficking conspiracy or his former testimony. Eric claimed that the prosecution threatened certain acts if he did not "cooperate with the grand jury," and that someone from the prosecution's office "went over several things" with him before he testified at the grand jury. Eric also indicated that his "life was in danger." Subsequently, based on Eric's claimed lack of memory, the prosecution declined to extend its grant of immunity to trial. Eric, who was represented by counsel, invoked his Fifth Amendment privilege not to testify,[3] which the court accepted. The court thereafter concluded that Eric was "unavailable" under MRE 804(a), and admitted his preliminary examination testimony under MRE 804(b)(1).[4]

Defendant did not timely object to the prosecution's alleged misconduct or the admission of Eric's preliminary examination. Therefore, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

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[3] US Const, Am V; see also Const 1963, art 1, § 17.

[4] Defendant does not dispute that a witness who asserts a valid Fifth Amendment privilege as justification for not testifying is "unavailable" for purposes of MRE 804(b)(1).

A witness is not unavailable if the failure to testify "is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing a witness from . . . testifying." MRE 804(a). If the prosecution causes a witness' failure to testify with either threats or actual prosecution, with the intent of preventing the witness' testimony, the witness will not be deemed "unavailable" under MRE 804(a). *People v McIntosh*, 142 Mich App 314, 324; 370 NW2d 337 (1985). But, a prosecutor has broad discretion to determine which charges to bring and when to bring them, and the judiciary may not usurp that authority. *People v Farmer*, 193 Mich App 400, 402; 484 NW2d 407 (1992). The "burden is on the prosecution to establish that the witness whose prior recorded testimony is being offered is, in fact, 'unavailable' and that the prosecution has not, either intentionally or negligently, contributed to making the witness unavailable." *McIntosh, supra* at 327.

There is no basis to conclude that the prosecutor revoked Eric's immunity merely to prevent him from testifying. Rather, the record reveals that the prosecutor reasonably surmised that Eric had contravened the terms of immunity conferred by MCL 780.701, i.e., to provide testimony concerning a crime. As previously indicated, after providing detailed grand jury testimony regarding a drug trafficking conspiracy, Eric claimed a complete lack of memory at Nathaniel's preliminary examination. Eric testified that he did not recall any incidents related to drug trafficking, nor did he recall any of his grand jury testimony. Eric even denied any memory of ordinary facts, such as his previous address. Considering that there was no indication that Eric planned to testify regarding the alleged crime, the prosecutor's decision to revoke Eric's immunity was not unreasonable or improper. *Farmer*, *supra*.

Also, there is no indication in the record that the prosecutor's case benefited from the absence of Eric's trial testimony. Eric would have either testified consistently with his preliminary examination testimony, wherein he claimed a lack of memory, or consistent with his grand jury testimony, wherein he detailed acts of drug trafficking. Conversely, there is no basis to conclude that the prosecutor's refusal to grant immunity resulted in the suppression of exculpatory testimony. Additionally, as noted by plaintiff, Eric offered very little inculpatory evidence against defendant. Eric's testimony was of comparatively minor importance considering the totality of the evidence the prosecution presented against defendant. As discussed in part III, there was substantial other evidence supporting defendant's conviction. In sum, there is no evidence suggesting that the prosecutor intentionally, or even negligently, contributed to Eric's unavailability. Reversal is not warranted regarding this unpreserved issue.[5]

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[5] We reject defendant's passing contention that the admission of Eric's preliminary examination testimony improperly deprived the jury of the opportunity to view Eric's body language, which was essential to judging his credibility. If a declarant is determined to be unavailable, MRE 804(b)(1) permits the declarant's "[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." See also *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Although defendant argues that the jury was denied the opportunity to judge the witness' demeanor, MRE 804(b)(1) only requires that there be a prior opportunity for cross-examination under a similar motive. Defendant does not argue that he was denied an opportunity for cross-

(continued...)

V. Sentence

Defendant's final argument is that he is entitled to resentencing because the sentencing judge was not the same judge who presided at his trial. We disagree.

Because defendant failed to timely object to the second judge imposing sentence or move to remand for a hearing regarding the visiting judge's availability, this issue is unpreserved. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra*.

"Generally, a defendant should be sentenced by the same judge who presided over the defendant's trial, provided that the judge is reasonably available." *People v Pierce,* 158 Mich App 113, 115-116; 404 NW2d 230 (1987), citing *People v Clemons,* 407 Mich 939; 291 NW2d 927 (1979). Here, a visiting judge was assigned to, and presided over, defendant's trial. The visiting judge was assigned to a different county at the time defendant was sentenced in February 2003. The visiting judge was not reasonably available to sentence defendant because he was no longer assigned to the court and, therefore, no longer had authority to act as a judge of the 6th Circuit Court at the time of sentencing. See *People v Van Auker (After Remand),* 132 Mich App 394, 399; 347 NW2d 466 (1984), rev'd in part on other grounds 419 Mich 918 (1984). Resentencing is not required.[6]

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens

(...continued)

examination under a similar motive.

[6] We note that the circuit court judge who imposed defendant's sentence was familiar with the facts of this case because he presided over the trials of alleged coconspirators, Nathaniel Lee, Johnny Stanley, and Louis Laws.

APPENDIX

B

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

STEVE ADAMS

Defendant-Appellant

UNPUBLISHED
November 27, 2001

No. 224911
Wayne Circuit Court
Criminal Division
LC No. 99-002712

Before: Owens, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to thirteen to forty years' imprisonment for the murder conviction and a consecutive, two-year term for the felony firearm conviction. He appeals as of right. We affirm.

Defendant contends that he was denied a fair trial because the prosecutor improperly declined to grant immunity to Tania Gordon, thereby causing her to invoke her Fifth Amendment privilege against self-incrimination and enabling the prosecutor to use her preliminary examination testimony at trial. Specifically, defendant contends that the prosecutor's actions constituted prosecutorial misconduct. However, a prosecutor has broad discretion in determining which charges to bring and when to bring them, and the judiciary is not to usurp that authority. *People v Farmer,* 193 Mich App 400, 402; 484 NW2d 407 (1992). Moreover, a "prosecutor has no duty to grant a witness immunity so that the witness can testify for a defendant, and a defendant cannot compel a grant of immunity." *People v Catanzarite*, 211 Mich App 573, 580; 536 NW2d 570 (1995). Here, there is no basis to conclude that Gordon's preliminary testimony was more favorable to the prosecution than Gordon's trial testimony might have been. Conversely, there is no basis for a conclusion that the prosecutor's refusal to grant immunity resulted in the suppression of exculpatory testimony. We believe that the prosecutor's decision was a reasonable exercise of discretion. Consequently, we are not persuaded that the prosecutor's decision constituted prosecutorial misconduct.

Defendant also contends that the trial court erroneously admitted Gordon's preliminary examination testimony. Specifically, defendant challenges the trial court's conclusion that Gordon was "unavailable" pursuant to MRE 804(a). Generally, a trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999).

If the prosecution brings about a witness's failure to testify with either threats or actual prosecution, with the intent of preventing the witness's testimony, then the witness will not be deemed "unavailable" pursuant to MRE 804(a). *People v McIntosh*, 142 Mich App 314, 324; 370 NW2d 337 (1985). The "burden is on the prosecution to establish that the witness whose prior recorded testimony is being offered is, in fact, 'unavailable' and that the prosecution has not, either intentionally or negligently, contributed to making the witness unavailable." *Id.* at 327. Again, there is no indication in the record that the prosecution's case benefited from the prevention of Gordon's trial testimony. Moreover, the record is devoid of evidence that the prosecution's denial of immunity was intended to prevent her testimony. In fact, the prosecutor stated that he was surprised by the testimony that suggested Gordon's culpability. In the absence of any evidence suggesting that the prosecutor intentionally, or even negligently, contributed to Gordon's unavailability, we concur with the trial court's conclusion that Gordon was "unavailable" pursuant to MRE 804(a). See also *People v Meredith*, 459 Mich 62, 66; 586 NW2d 538 (1998). In addition, the preliminary examination record supports the trial court's conclusion that defendant had an adequate opportunity to cross-examine Gordon at that hearing. Therefore, the trial court did not abuse its discretion by admitting Gordon's earlier testimony.

Next, defendant argues that he was denied his constitutional right to effective assistance of counsel. Because defendant did not raise this issue in a motion for a new trial or *Ginther*[1] hearing in the trial court, our review of this issue is limited to errors apparent on the record.[2] *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). To establish ineffective assistance of counsel, defendant must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Here, the record suggests that, although defense counsel was aware of defendant's claim that his car was not running on the date the charged offenses were committed, she was unable to obtain any evidence to support that claim. Thus, it is not apparent from the record that trial counsel failed to adequately investigate or prepare for defendant's case. Further, it is not apparent from the record what advice, if any, counsel gave defendant concerning his right to testify. Therefore, defendant has not demonstrated that counsel was deficient in this regard. Consequently, defendant has failed to overcome the presumption of effective assistance of counsel. *Toma*, *supra* at 302-303.

Defendant further asserts that he is entitled to, at the very least, a remand for an evidentiary hearing on the issue of his counsel's effectiveness. In *Gonzales v Elo*, 233 F3d 348, 356 (CA 6, 2000), the court opined that a defendant who wants to testify "can reject defense counsel's advice to the contrary by insisting on testifying, communicating with the trial court, or discharging counsel." The *Gonzales* court further opined:

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[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[2] Further, we have not considered the affidavits that defendant has submitted on appeal because they were not presented to the trial court. *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992).

> At base, a defendant must "alert the trial court" that he desires to testify or that there is a disagreement with defense counsel regarding whether he should take the stand. When a defendant does not alert the trial court of a disagreement, waiver of the right to testify may be inferred by the defendant's conduct. Waiver is presumed from the defendant's failure to testify or notify the trial court of the desire to do so. [*Id.* at 357; citations omitted.]

Here, defendant did not alert the trial court that he desired to testify or that there was any disagreement with defense counsel on this issue. Rather, defendant affirmatively waived his right to testify. As such, we do not believe that defendant is entitled to an evidentiary hearing.

Finally, defendant contends that the trial court erred by failing to ascertain whether defendant knowingly and intelligently waived his right to testify. In *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991), we specifically opined that a trial court is not required to determine that a defendant's waiver of his or her right to testify was knowing and intelligent. Consequently, defendant's argument is without merit.

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage

APPENDIX

C

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHANIEL LEE, JR.,

Defendant-Appellant.

UNPUBLISHED
December 14, 2004

No. 245455
Oakland Circuit Court
LC No. 2000-172582-FC

Before: Murphy, P.J., and O'Connell and Gage, JJ.

GAGE, J. (*concurring in part and dissenting in part*).

While I concur in the result reached by the majority, I write separately to express my conclusion that the trial court erred in admitting the grand jury testimony of the witness Eric Lee at trial.[1] The grand jury is an investigative tool of the prosecutor. *Tyson v Trigg,* 50 F3d 436, 440-441 (CA 7, 1995). As such, the testimony offered to the grand jury is designed to achieve a specific result. Quite simply, all of the reasons that exist for not allowing hearsay testimony into evidence come into play in this case. Eric was not realistically available for cross-examination at the preliminary examination, and he was completely unavailable at trial. His grand jury testimony was never truly subjected to cross-examination.

Admittedly, one could argue that the grand jury testimony could have been properly received at the preliminary examination even though Eric testified that he did not recall the grand jury testimony. MRE 801(d)(1)(a). However, the prosecutor cannot bootstrap the admission of grand jury testimony under MRE 801(d)(1)(a) at trial because Eric was no longer available for purposes of cross-examination. *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Eric's testimony was never tested for the trustworthiness that we hope to achieve by the adoption of the rules of evidence.

The question then becomes whether this error was harmless, using the following analysis:

[1] See *People v Russ,* 79 NY2d 173, 179; 589 NE2d 375 (1992) (there was "no cognizable justification" for reading the recalcitrant witness' entire grand jury testimony into evidence).

> In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative. An error is deemed to have been "outcome determinative" if it undermined the reliability of the verdict. In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence. [*People v Whittaker,* 465 Mich 422, 427; 635 NW2d 687 (2001) (citations omitted).]

As the majority notes, numerous witnesses testified regarding their dealings with the Lee family organization. Defendant used Helen Alexander's house to "cook up" and sell cocaine for many months in the late 1980s. Ralph McMorris purchased large quantities of cocaine from defendant and his brother Roderick Lee. Defendant received cocaine from codefendant Joe Abraham and disbursed it to other individuals for sale or use. On one occasion, Abraham sold Roderick many kilograms of cocaine, two kilograms of which was earmarked for defendant. Abraham also stated that defendant and Roderick sold more cocaine than any other drug organization.

In September 1994, the Pontiac police executed a search warrant at a house in Pontiac, finding weapons, ammunition, money, a digital scale, and cocaine. They also found defendant's receipts and identification in one of the bedrooms. In September 1998, the Pontiac police executed a search warrant at a home connected to the Lee family organization. They found numerous items of correspondence to defendant, ammunition, a weapon, a medicine bottle bearing defendant's name, a digital scale, and a cellular telephone. One of the letters to defendant referred to doing business with defendant and contained terms that are common names for cocaine. Defendant was not employed during the duration of the drug trafficking conspiracy, and he did not file Michigan tax returns from 1987 through 1998.

If Eric's grand jury testimony had been properly excluded, there would still be sufficient evidence of conspiracy to deliver or possess with intent to deliver 650 or more grams of a controlled substance, MCL 750.157a and MCL 333.7401(2)(a)(i). I therefore conclude that the trial court's error in admitting Eric's grand jury testimony was harmless and agree with the result reached by the majority.

/s/ Hilda R. Gage

APPENDIX D

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS EDWARD LAWS,

Defendant-Appellant.

UNPUBLISHED
December 14, 2004

No. 245454
Oakland Circuit Court
LC No. 1999-166148-FH

Before: Murphy, P.J., and O'Connell and Gage, JJ.

PER CURIAM.

Defendant was charged with conspiracy to deliver or possess with intent to deliver 650 or more grams of a controlled substance, MCL 750.157a and MCL 333.7401(2)(a)(i). Following a jury trial, he was convicted of the lesser offense of conspiracy to deliver or possess with intent to deliver at least 225 but less than 650 grams of a controlled substance, MCL 750.157a and MCL 333.7401(2)(a)(ii). He was sentenced to a prison term of 20 to 60 years. He appeals as of right. We affirm.

Defendant engaged in a long-term conspiracy with Nathaniel Lee, Roderick Lee, and others to traffic controlled substances. Nathaniel and Roderick led and equally controlled the distribution, and Joe Abraham was the organization's primary supplier. Another Lee brother, Shedrick, also transported large quantities of drugs into the state for the organization. Nathaniel and Roderick, in turn, supplied numerous individuals, including defendant, who sold the illicit drugs to third parties.

Defendant first argues that the evidence was insufficient to sustain his conviction because there was no evidence that he was "engaged in any conspiracy to possess with intent to deliver cocaine" beyond 1991, but merely evidence that he was "involved in drug sales." We disagree.

When ascertaining whether the prosecutor presented sufficient evidence to support a conviction, we "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

> To be convicted of conspiracy to possess with intent to deliver a controlled substance, the people must prove that (1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. [*People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997).]

The evidence indicated that Roderick and Nathaniel Lee led a drug trafficking group that included defendant. Nathaniel and Roderick received several kilograms of cocaine or heroin, which they distributed to third parties, including defendant. Defendant admitted that in 1990 and 1991, he bought multiple ounces of cocaine from Nathaniel and Roderick. At that time, defendant stated that he could sell nine ounces, four to five times a day. There was also evidence from which the jury could reasonably infer that defendant's involvement in a conspiracy to deliver or possess with intent to deliver a controlled substance continued beyond 1991. Eric testified that, on one occasion between 1992 and 1994, he saw defendant give Roderick at least $10,000 for approximately five hundred grams of a powdery substance, which he believed was cocaine. In May 1993, law enforcement officers executed a traffic stop on defendant's car and found that he was carrying large amounts of unexplained money. Stanley, defendant's uncle, was also in the car. There was evidence that Stanley bought cocaine from Roderick and distributed it to third parties, and was at Roderick's house throughout the 1990s.

In October 1993, police discovered that defendant was selling drugs when an officer had contact with one of defendant's customers. Eric testified that, in 1994 or 1995, he saw defendant give Roderick between $5,000 and $10,000. Eric believed that Roderick gave defendant about fourteen grams of heroin, although he did not see the exchange. Eric testified that, later that day, defendant told him that heroin sold for $40 a pack in Chicago and invited Eric to Chicago. In 1995, defendant started working with law enforcement and named Roderick as one of his drug suppliers. Defendant then successfully engaged in two controlled buys from Roderick in January and February 1995. From this evidence, a jury could reasonably infer that, as of 1995, defendant and Roderick still had an agreement regarding the sale and distribution of a controlled substance. In 1996, after defendant was no longer working for law enforcement, he was discovered in a heavy drug trafficking area in Pontiac, carrying more than $6,000.

Additionally, defendant's friend, Helen Alexander, testified that she purchased cocaine from defendant intermittently "every day for about 10-15 years," and sometimes two to six times a day, some of which she sold to third parties. Defendant also sold cocaine to Alexander's cousin. According to Alexander, defendant was aware that she was selling the cocaine that she received from him to third parties. She delivered 3.5-gram quantities of cocaine for defendant about fifty times. Alexander was also with defendant when he sold cocaine in amounts of 28 and 125 grams to third parties. Finally, there was evidence that from 1987 through 1998, defendant, like other coconspirators, was not employed and did not file any tax returns.

A prosecutor "is not obligated to disprove every reasonable theory consistent with innocence," but only needs to prove his own theory beyond a reasonable doubt given the contrary evidence proffered by the defendant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Viewed in a light most favorable to the prosecution, the evidence presented in this case reflected a long-term conspiracy to traffic drugs and was sufficient to sustain defendant's

conviction for conspiracy to deliver or possess with intent to deliver 225 or more but less than 650 grams of a controlled substance.[1]

Defendant next argues that the trial court abused its discretion by admitting Eric Lee's preliminary examination testimony at trial under MRE 804(b)(1), because he was not "unavailable" under MRE 804(a). Defendant argues that the prosecution improperly revoked the witness's immunity before trial, forcing him to invoke his privilege against self-incrimination and enabling the prosecution to use his preliminary examination testimony rather than direct testimony. We disagree. We review for abuse of discretion a trial court's evidentiary rulings. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000).

Eric, who was involved in the drug trafficking conspiracy, testified before a grand jury in April 1998, and gave critical evidence against defendant and the Lee family organization. He also testified at defendant's December 1998, preliminary examination. When he testified at Nathaniel's preliminary examination in May 2000, however, he claimed he could not recall any details about the alleged drug trafficking conspiracy or his former testimony. Eric even denied any memory of ordinary facts, such as his previous address. Based on this claimed lack of memory, the prosecution declined to extend its grant of immunity to cover defendant's 2002 trial. Eric invoked his Fifth Amendment privilege not to testify at trial, and the court accepted it. As a result, the court concluded that Eric was "unavailable" under MRE 804(a). In response to defense counsel's objections, the court also concluded that defense counsel had an opportunity to cross-examine the witness, noting that he asked several questions and was present throughout the hearing. The court admitted Eric's preliminary examination testimony.

A trial court may admit a witness's prior testimony under MRE 804 if the witness is unavailable because he validly asserts a privilege from testifying. However, according to MRE 804(a),

> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing a witness from testifying.

If the prosecution intentionally causes a witness's failure to testify with either threats or actual prosecution the witness will not be deemed "unavailable" under MRE 804(a). *People v McIntosh*, 142 Mich App 314, 324; 370 NW2d 337 (1985). "[T]he burden is on the prosecution to establish that the witness whose prior recorded testimony is being offered is, in fact,

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[1] Defendant suggests that the evidence was insufficient and the trial court's instructions were erroneous because his cocaine purchase from the Lee brothers in the early 1990's was outside the six-year statute of limitations period, noting that he was indicted in 1998. As defendant acknowledges, this Court previously rejected this claim in a prior appeal of this matter. See *People v Laws*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2001 (Docket No. 223377). Therefore, we will not revisit these issues as our prior decision is now the law of the case.

'unavailable' and that the prosecution has not, either intentionally or negligently, contributed to making the witness unavailable." *Id.* at 327.

In this case, the prosecution did not revoke Eric's immunity merely to prevent him from testifying. Rather, the prosecution reasonably surmised that Eric would not provide testimony at trial, but would again feign a loss of memory. Because Eric had already indicated his unwillingness to testify according to the immunity agreement, the prosecutor's decision to revoke Eric's immunity was not unreasonable. Therefore, Eric could invoke his right to remain silent, and was not available. Because defendant had a prior opportunity to cross-examine Eric at the preliminary examination, the trial court did not abuse its discretion when it allowed the unavailable witness's testimony. *Crawford v Washington*, 541 US ___; 124 S Ct 1354, 1369; 158 L Ed 2d 177 (2004).

Defendant also claims that he was denied due process and equal protection of the law when the trial court failed to award him 907 days of credit against his new minimum sentence for the time he served in jail before his sentence for the instant crime, which he committed while on parole. Defendant concedes that the present offense occurred while he was on parole for another offense and acknowledges that no credit may be awarded for an offense committed while on parole. Nevertheless, he argues that the credit he seeks is constitutionally required as a matter of due process, equal protection, and the double jeopardy right to not be subjected to more punishment than the Legislature intended. We disagree. In *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 147 (1994), we stated that, under MCL 791.238, the fact that parolees are precluded from receiving credit for time served while being held on parole detainer and, therefore, treated differently than persons in jail awaiting trial, is not unconstitutionally discriminatory. We held that the statute does not violate a defendant's right to equal protection or due process. *Stewart, supra*. The fact that a statute prevents us from providing defendant the requested credit demonstrates that the Legislature did not intend defendant to receive it. *People v Calloway*, 469 Mich 448, 453; 671 NW2d 733 (2003). Therefore, defendant's constitutional challenges to his jail credit fail.

Defendant raises several claims in propria persona. Defendant first claims that the trial court erred when it allowed evidence of his "prior run-ins-with the law." We disagree. The record demonstrates that the prosecutor did not offer the evidence to show that defendant had a bad character, but to prove defendant's common scheme, plan, and system for trafficking cocaine. Using the evidence, the prosecutor showed that defendant engaged in a long-term drug trafficking conspiracy with Nathaniel and Roderick of the purported Lee family organization, and others. Therefore, the challenged evidence was directly probative of defendant's continuing conspiracy, and the trial court did not abuse its discretion by admitting it.

Defendant next claims that the trial court erred when it instructed the jury on the lesser offense of conspiracy to deliver or possess with intent to deliver at least 225 but less than 650 grams of a controlled substance, the crime for which he was ultimately convicted. However, the record reflects that defense counsel acquiesced in the trial court's decision to give the lesser offense instruction and expressed satisfaction with the trial court's instruction. Because any error was waived, there is no error to review. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Likewise, defendant's claim that, in hindsight, the trial court should have instructed the jury on "the difference between a buyer-seller v. conspiracy" was waived.

Next, defendant confusingly argues that the trial court erred in "allowing [him] to be prejudiced by a variance in the facts presented to the jury." This argument appears to boil down to a claim that defendant was forced to defend on the lesser included offense of conspiracy to deliver or possess with intent to deliver at least 225 but less than 650 grams of a controlled substance without proper notice. Nevertheless, the charge of the greater offense put defendant on notice that the prosecutor might charge him with the lesser offense, so defendant's argument lacks merit. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998).

We reject defendant's final argument that the cumulative effect of several errors deprived him of a fair trial, because no cognizable errors exist. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Hilda R. Gage